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NO. 84-590

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

RED STAR MARINE SERVICES, INC.,

Petitioner,

vs.

RAYMOND J. DONOVAN, SECRETARY OF LABOR,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF FOR PETITIONER

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To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

After oral argument of the appeal below the Coast Guard was invited by the Court of Appeals *sua sponte* to answer four questions posed by the Court relating to the authority of the Coast Guard to regulate uninspected vessels. Respondent has added to the record on this petition the reply of the Chief Counsel of the Coast Guard dated March 30, 1984. That reply as well as the references therein to United

States Coast Guard Navigation and Inspection Circular No. 12-82, places new issues before the Court which are properly addressed in this reply brief. Further, the failure of respondent to comment upon the geographical limitation on the jurisdiction of the Occupational Health and Safety Administration (OSHA) merits this reply brief.

Respondent has ignored the conflict between OSHA's position that it can regulate the workplace of seamen on the high seas and the geographic scope of OSHA's authority. The express definition within the statutes governing and defining OSHA's purview does not include the high seas. 29 U.S.C. 653(a), 43 U.S.C. 1331(a), 43 U.S.C. 1301; *Donovan* v. *Texaco, Inc.*, 720 F.2d 825, 829 (5th Cir. 1983) (Pet. 11).* There can be no clearer statement of Congressional intent that OSHA cannot regulate the workplace of the tug STAMFORD which is authorized to, and does, ply the waters of the high seas. The Coast Guard did a stability analysis of the STAMFORD which pertained to the safety of the crew. (Pet. 28a). This stability analysis led to the issuance of a load line certificate pursuant to 46 U.S.C. §88 allowing the vessel to navigate on the high seas. (Pet. 13a).

The decisions, which are the keystone of Respondent's argument, permitting dual exercise of authority of an industry by OSHA and a sister agency, all involve land based work areas obviously within the Congressionally defined geographic scope of OSHA and are inapposite to this case. (Resp. 6, 7, 8)** *Southern Ry. Co.* v. *OSHRC,*

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* References to petition and appendix to the petition for writ of certiorari are designated herein as: "Pet.—."

** References to Brief For Respondent and appendix thereto are designated herein as "Resp.—."

539 F.2d 335 (4th Cir. 1976); *Southern Pacific Transportation Co.* v. *Usery,* 539 F.2d 386 (5th Cir. 1976); *Baltimore & O.R.R.* v. *OSHRC,* 548 F.2d 1052 (D.C. Cir. 1976).

The Coast Guard Chief Counsel stated in response to the inquiry of the Court of Appeals that, "Over the past twenty years several attempts have been made to obtain additional grants of authority from the Congress to more *comprehensively* regulate portions of the uninspected vessel fleet. (emphasis added) (Resp. 3a). Explicit in this statement is the fact that the Coast Guard does exercise "comprehensively" and does have "authority" to regulate uninspected vessels. Contrary to Respondent's assertion (Resp. 8, f.n.5), Petitioner does assert that the Coast Guard has *exercised* authority to regulate specific working conditions on board uninspected vessels including stability (Pet.. 29a), ventilation, navigation, fire protection equipment, life preservers and other life saving equipment (Pet. 30a), as well as requirements for qualification of personnel (46 C.F.R. 26.25-1). Respondent's assertion that the Coast Guard has not exercised any authority to regulate, generally, engine rooms ignores those regulations in 46 C.F.R. Subchapter C concerning the design, construction and testing of boilers and machinery; liquified petroleum gas, and backfire flame arrestors for gasoline equipment. *Dillingham Tug & Barge Corp.,* 10 O.S.H. Cas., (BNA) 1859, 1982 OSHD 32, 993, 32, 996.

The letter of the Coast Guard Chief Counsel (Resp. 2a) refers to the Navigation and Vessel Inspection Circular 12-82 (App., *infra*) which contains recommendations to regulate noise hazards aboard inspected vessels and guidelines for uninspected vessels for the same purpose. Although the recommendations were "not directed specifically to uninspected vessels, the Coast Guard considers

them to be appropriate guidelines should any owner of uninspected vessels also choose to follow them." (App. 2a). The Coast Guard recommendations apply to all commercial inspected vessels but are not regulations promulgated governing that fleet. Hence, the Coast Guard does not have noise regulations applying to inspected or uninspected vessels. The recommendations do not have the force of law. The recommendations are as much an exercise of authority over the uninspected fleet as they are over the inspected fleet. The issuance of "guidelines" for noise hazards on uninspected vessels is plainly an actual exercise of authority by the Coast Guard in this area. The legislative history of OSHA supports this rationale:

> It is intended that the Secretary of Labor will not exercise his authority where another agency with appropriate jurisdiction *has taken steps* to exercise its authority even though the action might be at the formative stage of regulations or enforcement. (emphasis added). Staff of Subcommittee on Labor, Senate Comm. on Labor & Public Welfare, 92nd Cong. 1st Sess., Legislative History of the Occupational Safety & Health Act of 1970, 997 (Comm. Print 1971).

A comparison of the Coast Guard recommendations and the OSHA noise hazard regulations demonstrate realistic considerations which support the conclusion that jurisdiction should not be taken from the Coast Guard, the agency with expertise in the marine industry and given to OSHA. The Coast Guard recommendations are based on studies which account for the requirement that seamen on vessels like the STAMFORD must work and live in the workplace. These studies were cognizant of the important differences between the environment of shoreside

workers and seamen (App. 3a). Accordingly, the Coast Guard method of evaluating excessive noise in the maritime industry is by measuring noise exposure for the complete twenty-four hour day. This . . . "concept differs somewhat from the criteria proscribed [sic] by the Occupational Safety and Health Administration (OSHA) because of several factors which distinguish the maritime industry from industry ashore." (App. 4a). The OSHA regulations are consistent with the land based geographical scope of OSHA's jurisdiction. 29 U.S.C. 653(a). The OSHA regulations are based upon measuring exposure during a one-quarter hour to eight hour period. 29 C.F.R. §1910.95.

The OSHA noise hazard regulations realistically should not be applied to the marine industry whether the vessels are uninspected or inspected. The OSHA noise hazard regulations are based upon a different concept and criteria than the Coast Guard guidelines. Their application to uninspected vessels is manifestly unfair.

Attempts by OSHA and the Coast Guard to administratively "carve up" the jurisdiction of the uninspected fleet of the marine towing industry should not be permitted as a substitute for Congressional action. The effect of the "administratively created" division of jurisdiction over the workplaces of seamen is to place the employer in the difficult position of complying with two agencies concerning the occupational safety and health of its employees. The difficulty of this position is exhibited by the voluminous amount of OSHA regulations which constitute a stack of paper over six feet high. *Secretary* v. *Belt Ry. of Chicago*, 20 OSAHRC 575, 3 Occupational Safety & Health Rep. (BNA) 1617. The difficulty is further exhibited by con-

sidering the fact that the OSHA regulations do not consider the idiosyncratic nature of the maritime workplace.

Dated: New York, New York
February 11, 1985

Respectfully submitted,

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APPENDIX

Navigation and Vessel Inspection Circular No. 12-82

[SEAL]

DEPARTMENT OF TRANSPORTATION
UNITED STATES COAST GUARD

Mailing Address

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Washington, D.C. 20593
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NVC 12-82

2 Jun 1982

NAVIGATION AND VESSEL INSPECTION CIRCULAR NO. 12-82.

Subj: Recommendations On Control of Excessive Noise.

Ref: (a) 46 CFR 32.40-15

(b) 46 CFR 72.20-5

(c) 46 CFR 92.20-5

(d) International Maritime Organization (IMO) Resolution A.468(XII), "Code On Noise Levels On Board Ships".

(e) U.S. Naval Ocean Systems Center, "Study of Airborne Noise On Merchant Ships" (see enclosure (9), reference 1).

Navigation and Vessel Inspection Circular No. 12-82

1. *PURPOSE.* This Circular contains Coast Guard's recommended guidlines to the U.S. maritime industry for addressing conditions of high noise. The guidelines were developed in consideration of the need for protecting crewmembers from noise exposures which may produce permanent noise induced hearing loss; for providing crewmembers with suitable conditions for recuperation from the effects of exposure to high noise levels; and for providing a safe working environment by giving consideration to the need for effective speech communication and for hearing audible alarms and warnings. Amplifying information in attached enclosures is provided as guidance in addressing key aspects of noise control.

2. *APPLICATION.*

a. The recommendations of this Circular apply to all commercial vessels inspected by the Coast Guard except Mobile Offshore Drilling Units.

b. Although these guidlines are not directed specifically to uninspected commercial vessels, the Coast Guard considers them to be appropriate guidelines should any owner of uninspected vessels also choose to follow them.

c. At the time of this publishing, the Coast Guard is collecting data to determine whether separate guidelines would be appropriate for inspected offshore drilling units and fixed structures. However, in lieu of separate guidelines, these guidelines are recommended for the interim.

Navigation and Vessel Inspection Circular No. 12-82

3. *DISCUSSION.*

a. According to a recent Coast Guard-sponsored study (enclosure (9), ref. 1), noise exposures of certain personnel aboard U.S. merchant vessels were found to be in excess of those considered to be safe. The study also indicated that high noise levels aboard ship interfere with speech intelligibility, internal shipboard communications and the audibility of warning signals, which potentially impairs the safety of some operations on the vessel. Additional studies from foreign countries and information from other sources overwhelmingly support these findings for virtually all classes of commercial vessels. The studies also demonstrate that unlike shoreside workers who can retreat to a quiet environment after their work shift, merchant seamen are part of a mobile environment and may not have the opportunity to retreat to a quieter, relaxed atmosphere. Crew quarters, recreation areas, mess rooms, etc. are sometimes as noisy as the working environment. Similar problems are also widely reported in the offshore drilling industry. (NOTE: At the time of this publishing, the Coast Guard is still conducting a study on the particular noise problems in the offshore drilling industry.)

b. The effect of noise on hearing is a function of the actual noise level, its component frequencies and the duration of exposure. An excessive combination of these elements results in a shift in a person's threshold of hearing, i.e., an elevation in the lowest level of sound detectable to the ear. A threshold shift may be recoverable to varying degrees, depending upon its magnitude, provided the

perseon retreats to a quiet environment (generally accepted as below 75 db(A)) for a sufficient time. While small threshold shifts may be totally recovered, large shifts are only partially recoverable leaving with each occurrence a small permanent threshold shift, known as hearing loss. The minimum goal of a noise control program should be to insure that an exposure (noise level over a certain duration) is not so great that the temporary threshold shift cannot be recovered during the following rest period.

c. After careful study, the Coast Guard has concluded that the most meaningful method of evaluating excessive noise in the maritime industry is by measuring the cumulative noise exposure during the complete 24-hour day. In addition to consideration of the normal work time noise exposure, the 24-hour exposure measurement considers the time after exposure to high noise to evaluate whether sufficient quiet time is provided to allow for recovery from temporary threshold shift. The term which will be used to express this measurement is the "24-hour effective exposure level," or Leff (24), and is defined in technical terms in enclosure (1). The Leff (24) concept differs somewhat from the criteria proscribed by the Occupational Safety and Health Administration (OSHA) because of several factors which distinguish the maritime industry from industry ashore. However, the Leff (24) criteria would afford similar protection.

d. The exposure limit recommended herein (82 dB(A)) is, like almost all exposure limits, based upon an evaluation of a certain degree of risk to

some personnel and does not insure that all personnel will not incur hearing damage. For this reason a hearing conservation program containing a system for periodic audiometric testing of personnel is necessary to detect those susceptible persons at the initial outset of a hearing impairment before any appreciable damage is accrued. Since, such a program would generally not be necessary if exposure levels (computed without regard to attenuation contributed by hearing protective devices) were further reduced to 77db(A), the Circular suggests that new vessels be so designed so that the 77db(A) level may be achieved.

e. The control methods, i.e., engineering controls, administrative controls or hearing protective devices selected by the owner/operator of a unit to achieve the recommended exposure limits, would depend upon economic and other considerations. Based upon data obtained from the study conducted by the Coast Guard and the state of the art in present noise control technology, the recommendations could be implemented on most units without retrofitting, principally through the use of hearing protectors. Other units may additionally need to administratively limit the time of exposure, and/or install soundproof control booths. Ultimately, however, installation of permanent engineering controls to reduce noise levels is the best means of assuring effective hearing protection. Although this technology may be young in marine applications (in the United States), the Coast Guard has seen several examples where significant reductions in noise levels in engineering compartments through modest engineering controls were achieved. The exposure levels

in this proposal are such that they may be economically achieved on many vessels by using these engineering controls. It is encouraged that engineering controls be used whenever economically feasible.

f. In November 1981 the International Maritime Organization (IMO, formerly IMCO) approved a standard on shipboard noise entitled "Code On Noise Levels On Board Ships," which applies basically to new ships of 1600 gross tons or more. The Coast Guard participated in the development of this Code and endorses its recommendations. As the preamble to the Code makes clear however, it was not intended that the Code be adopted verbatim by member nations. Rather, each nation was permitted the flexibility to implement the priniciples of the Code through a method suited to the maritime industry of that nation. The Coast Guard believes therefore, that the recommendations in this Circular are a satisfactory implementation of the IMO Code. (NOTE: The IMO Code contains a section suggesting recommended noise level limits for various types of spaces on a unit. It is believed that this list offers guidance which would be useful to the designers of U.S. vessels and is therefore incorporated verbatim as an enclosure to this Circular. These levels are provided primarily as guidlines which might be useful for design specifications for suitable types of new vessels.)

g. It is considered that implementation of the recommendations in this Circular will involve an ongoing process encompassing a time frame of several months to years, depending upon the vessel. It is anticipated that phrase involving measurement,

provision of hearing protection devices, installation of some engineering controls, implementation of the hearing conservation program and other administrative aspects could be completed within two years. However, it may take up to four years before complete engineering solutions can be designed and installed.

h. The limits and procedures set out in these guidlines are regarded as minimum acceptable precautions against high noise conditions. For a greater margin of safety, owners and operators may wish to provide higher levels of protection. Also, as technology improves and as more scientific information becomes available, considerations will be given to amending these guidlines accordingly.

4. *ACTION.*

a. The following paragraphs b through i contain recommended guidlines fro protecting crewmembers from conditions of high noise. Additional information in the attached enclosures (1) through (9) are provided to amplify certain provisions of the recommendations. Definitions of terms used contained in enclosure (1).

b. *Recommended Exposure Limit.*

(1) Each crewmember's 24-Hour Effective Exposure Level, Leff(24), as defined in enclosure (1), should be constrained to a maximum of 82 dB(A).

(2) If exposure levels were further reduced, through engineering and administrative controls

alone, to an Leff(24) criteria of 77 dB(A, the hearing conservation program outlined below would no longer be necessary in most cases. The Coast Guard believes that the technology to accomplish this objective will be feasible on most deep-sea vessels, over 1600 gross tons, constructed after 1985 and recommends designing to the 77 dB(A) criteria at that time.

(3) NOTE: The exposure limits specified above are based upon the findings that exposures to high noise in the maritime industry are normally intermittent, as defined in enclosure (1). If work shift noise exposure is continuous, vice intermittent, then exposure levels should be reduced even further.

(4) Leff(24) can be achieved by any combination of engineering controls, administrative controls or hearing protective devices. However, because engineering controls provide the most positive means of assuring adequate protection, it is recommended that engineering controls be given first consideration and evaluated for feasibility before opting for other methods. Discussions on engineering controls and hearing protective devices are included in enclosures (4), (7) and (8).

(5) The Coast Guard realizes that reducing noise levels generally becomes increasingly more difficult on smaller vessels. It was for this reason that the IMO noise level limits referred to in subparagraph c.(2) below were restricted to vessels over 1600 gross tons. On many existing vessels of less than 500 gross tons, the incorporation of effec-

tive structural and engineering alterations to attenuate structure-borne noise may be economically prohibitive. However, through the use of hearing protective devices, administrative controls and selective engineering changes, the recommended 24-hour exposure limit, Leff(24), of 82db(A) should still be attainable.

c. *Recommended Noise Limits.*

(1) Where practicable, maximum noise levels in berthing spaces, and in mess spaces of units over 500 gross tons, should be no greater than 75 dB(A) on existing units and 70 dB(A) on new units.

(2) Annex III, paragraph (1)(e), of the International Regulations for Preventing Collisions at Seat, 1972 (commonly called the 72 COLREGS) contains the following requirements: "The sound pressure level of the vessel's [fog whistle] at listening posts shall not exceed 110 dB(A) and so far as practicable should not exceed 100 dB(A)." The 72 COLREGS are U.S. law and are mandatory for all U.S. vessels navigating on the high seas.

(3) As stated in Discussion paragraph 3.f., the "Code On Noise Levels On Board Ships," a noise standard published in November 1981 by the International Maritime Organization (IMO), contains a listing of suggested noise level limits for various spaces on ship. The Coast Guard considers that these limits would generally be appropriate for adoption as minimum design specifications for ocean-going vessels over 1600 gross tons which would be subject to the IMO Code. This list of limits is in enclosure (6). It is not intended

that the list supplant any other recommendation in this paragraph 4., nor is it meant to imply that, if followed, would any exposure limit recommended herein be automatically achieved.

d. *Hearing Protective Devices.*

(1) Unless the Leff(24) computed or measured for a crewmember accounts for and allows such an exposure, crewmembers should be required to wear hearing protective devices whenever entering spaces with noise levels greater than 85 dB (A).

(2) NOTE: Any exposure of persons not wearing hearing protection to noise levels over 105 dB(A) should be avoided. However, if such exposures are unavoidable, they should be constrained to the principle of intermittent exposure (see definition in enclosure (1)) such that each exposure duration is one-seventh of the total allowable exposure at that noise level.

(3) At no time should the unprotected ears of crewmembers be exposed to non-impulse noise levels over 115 dB(A) or to impulse noise levels over 140 dB(A).

e. *Evaluation of Noise Conditions.*

An evaluation of noise conditions should be conducted on each unit and the results documented. The evaluation should consider noise conditions during all normal operations underway and in port. Enclosure (3) should be consulted with regards to proper equipment and measurement procedures.

f. *Warning Notices.*

(1) Where the noise level in spaces exceeds 85 dB(A), entrances to such spaces should carry a warning notice advising personnel of the noise hazard and the need for hearing protection. (A guide for design of this sign is the ANSI Specification for Accident Prevention Signs, Z35.1-1972.) If only a minor portion of the space has such noise levels the particular location(s) or equipment should be identified at eye level, visible from each direction of access.

(2) Where hand tools, galley and other portable equipment product high noise levels in normal working conditions, warning information should be provided, preferably on the device.

g. *Instruction to Crewmembers.*

(1) Crewmembers should be instructed in the hazards of high and long duration noise exposure and the risk of noise induced hearing loss. Instruction should also include a description of the unit's noise control program, the types of hearing protection devices provided and their proper use and care, and the unit's hearing conservation program.

(2) Appropriate crewmembers should receive such instruction as it necessary in the correct use and maintenance of machinery and silencers or attenuators in order to avoid the production or transmission of unnecessary noise.

h. *Hearing Conservation Program.*

(1) All crewmembers having 24-Hour Effective Exposure Levels (computed, in this case, without regard to attenuation contributed by hearing protective devices) greater than 77 dB(A) or routinely exposed to noise levels greater than 85 dB(A) should be included in a hearing conservation program as outlined in enclosure (5).

(2) Much of the maritime industry utilizes a highly mobile labor force of which individual personnel work a vessel or rig for a limited period and then move on to another unit. Consequently, it is often impractical for operators of these units to individually implement portions of hearing conservation programs involving audiometric testing and recordkeeping. In such cases it is recommended that a program of audiometric testing be coordinated on a group basis between the owner/operators and the employees.

i. *Responsibilities.*

(1) The owner/operator of unit should be responsible for ensuring that means for noise reduction and control are applied and maintained according to the recommendations of this Circular. Particular attention should be paid to insuring that the unit's officers are informed of the provisions of the unit's noise control program and the need for instructing crewmembers as provided in paragraph f, and to insuring that hearing protectors are provided and maintained.

(2) Crewmembers should be responsible for complying with the unit's noise control program,

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as instructed, paying particular attention to wearing provided hearing protectors in the proper manner while working in the prescribed locations.

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